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## U.S. Forest Service v. Cowpasture River Preservation Ass'n.

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***U.S. Forest Serv. v. Cowpasture River Preservation Ass’n,***  
**140 S. Ct. 1837 (2020)**

**Taylor Simpson**

The United States Supreme Court ruled in favor of the United States Forest Service and Atlantic Coast Pipeline, LLC, a company who planned to construct a natural gas pipeline under a section of the Appalachian National Scenic Trail within the George Washington National Forest. The legal battle sought to clarify whether the United States Forest Service had the authority to grant the pipeline builder a right-of-way across the Appalachian Trail. The Court ruled that the National Park Service holds an easement for administering the Appalachian Trail, but the land over which the trail crosses remains under the jurisdiction of the Forest Service. Therefore, under the Mineral Leasing Act, the Forest Service had the authority to grant Atlantic Coast Pipeline a pipeline right-of-way under the Appalachian Trail.

**I. INTRODUCTION**

Atlantic Coast Pipeline, LLC (“Atlantic”) cleared a major legal challenge to the construction of a 604-mile natural gas pipeline from West Virginia to North Carolina.<sup>1</sup> The legal challenge centered on a 0.1-mile section of pipeline that would traverse 600 feet under the Appalachian National Scenic Trail (“AT”) as part of a sixteen mile section crossing the George Washington National Forest.<sup>2</sup> Atlantic obtained permits from the United States Forest Service (“Forest Service”), including a right-of-way for the 0.1-mile AT segment.<sup>3</sup> The issue in the case was whether the Forest Service had the authority to grant the right-of-way for the section of pipeline that crossed the AT.<sup>4</sup> Under the Mineral Leasing Act (“Leasing Act”), federal agencies can grant pipeline rights-of-way on all federal lands except for national park land.<sup>5</sup> The National Park Service (“Park Service”), not the Forest Service, administers the AT, a national scenic trail in the National Trail System.<sup>6</sup> The Court held that even though the Park Service administers the AT, the land over which the trail passes is not part of the National Park System. Therefore, the Forest Service had the authority, under the Leasing Act, to grant Atlantic its right-of-way.<sup>7</sup>

Shortly after this decision, Atlantic decided to cancel construction of the pipeline, citing legal uncertainties facing the project as well as its

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1. U.S. Forest Serv. v. Cowpasture River Preservation Ass’n, 140 S. Ct. 1837, 1841 (2020).

2. *Id.* at 1841–42.

3. *Id.* at 1842.

4. *Id.* at 1843–44.

5. *Id.* at 1843.

6. *Id.* at 1841.

7. *Id.*

ballooning costs from lawsuits.<sup>8</sup> Lawsuits reportedly increased the cost of the pipeline from \$4.5 billion to \$8 billion.<sup>9</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

Passed in 1920, the Leasing Act gave the Secretary of the Interior the power to grant pipeline rights-of-way through public lands.<sup>10</sup> This Act was further amended in 1973 to allow other agency heads the same power.<sup>11</sup> The 1973 amendments defined “public lands” as “all lands owned by the United States, except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf.”<sup>12</sup> Congress had previously defined the National Parks System in 1970 as “any area of land and water now and hereafter administered by the Secretary of Interior, through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.”<sup>13</sup> This carve-out means that companies cannot rely on the Leasing Act for a right-of-way for a potential pipeline crossing national park land.<sup>14</sup>

Enacted in 1968, the National Trails Systems Act (“Trails Act”) established a system of national scenic and historic trails.<sup>15</sup> The Trails Act gives administrative responsibilities for the AT to the Secretary of the Interior, who delegated these responsibilities to the National Park Service.<sup>16</sup> In 2015, Atlantic began the permitting process for a 604-mile natural gas pipeline that would run from West Virginia to North Carolina.<sup>17</sup> This proposed route included a sixteen-mile segment through the George Washington National Forest with a 0.1-mile section crossing under the AT. Because the pipeline crossed national forest land, Atlantic needed specific use permits from the Forest Service as well as a right-of-way for the 0.1-mile AT segment.<sup>18</sup> The Forest Service granted these permits in 2018.<sup>19</sup> Cowpasture River Preservation Association, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia (“Respondents”) filed a petition for review, after exhausting all administrative appeals, in the United States Court of Appeals for the

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8. Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, NEW YORK TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/business/atlantic-coast-pipeline-cancel-dominion-energy-berkshire-hathaway.html>.

9. *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, DOMINION ENERGY (July 5, 2020), <https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline>.

10. *Cowpasture River Preservation Assn.*, 140 S. Ct. at 1843.

11. *Id.*

12. *Id.* (quoting 30 U.S.C. § 185(b) (2018)).

13. *Id.* (quoting 54 U.S.C. § 100501 (2018)).

14. *Id.* at 1853.

15. *Id.* at 1843 (citing 16 U.S.C. § 1244(a) (2018)).

16. *Id.*

17. *Id.* at 1841.

18. *Id.* at 1842.

19. *Id.*

Fourth Circuit. The Respondents contended that the pipeline right-of-way granted to Atlantic to cross under the AT was a violation of the Leasing Act.<sup>20</sup> Atlantic intervened.<sup>21</sup>

The Fourth Circuit ruled in favor of Respondents, holding that the Forest Service did not have the statutory authority to grant pipeline rights-of-way across the AT pursuant to the Leasing Act.<sup>22</sup> The court found that the AT was a part of the National Park System because administrative duties had been delegated to the National Park Service.<sup>23</sup> Therefore, the Fourth Circuit concluded that because the AT was part of the National Park System, it was “beyond the authority of ‘the Secretary of the Interior or appropriate agency head’ to grant pipeline rights-of-way.”<sup>24</sup> The United States Supreme Court granted certiorari to determine if the Forest Service could grant a right-of-way for the Atlantic Coast Pipeline to cross the AT.<sup>25</sup>

### III. ANALYSIS

The Court analyzed multiple interacting federal laws including the Leasing Act and the National Trails Systems Act, and issues pertaining to federalism and private property rights.

#### A. *National Trails as Easements*

The Forest Service and the Park Service entered into a right-of-way agreement for the 780 miles of the AT that traverses national forest land in 1971.<sup>26</sup> Respondents argued that this right-of-way agreement converted the federal land beneath the AT into National Park System land, and under the Leasing Act, a pipeline cannot cross federal land within the National Park System without congressional authorization.<sup>27</sup> The Court rejected this argument by relying on basic property law principles and legislative history.<sup>28</sup> Citing contemporary cases and definitions, the Court defined a right-of-way as a type of easement granting a limited “right to pass . . . through the estate of another.”<sup>29</sup>

Around the time the Trails Act was enacted, courts acknowledged that rights-of-way only gave nonpossessory rights, and that the grantor of

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* (quoting 30 U.S.C. § 185(a) (2018)).

24. *Id.*

25. *Id.* at 1841.

26. *Id.* at 1844.

27. *Id.* at 1848.

28. *Id.* at 1845–46.

29. *Id.* at 1844 (quoting *Right-of-way*, BLACK’S LAW DICTIONARY 1489 (4th ed. 1968)).

the right-of-way retained full ownership of “the land itself.”<sup>30</sup> The Court opined that if a private land owner granted a right-of-way to a private company for a pipeline, “no one would think” the company now owned the land.<sup>31</sup> Relying on this logic and the absence of contrary language in the Trails Act, the Court reasoned that Congress would not attach two different meanings to the “same term in the same statute” and grant a more expansive meaning for federal agencies.<sup>32</sup> Based on these definitions, the Court applied a basic principle of property law: “easements are not land, they merely burden land that continues to be owned by another.”<sup>33</sup>

The Court held that the Park Service holds an easement for the purpose of creating and administering the AT, but “the land itself remains under the jurisdiction of the Forest Service.”<sup>34</sup> This means that the AT falls outside the 1970 definition of National Park System land.<sup>35</sup> Therefore, the AT was national forest land, not national park land, and the Forest Service could grant Atlantic’s pipeline right-of-way under the Leasing Act.<sup>36</sup>

#### *B. Congressional Intent and Private Property Concerns*

To determine whether the AT was part of the National Park System, the Court examined similar legislation to the Trails Act to further understand and apply Congress’s intent. These other statutes, when intending to transfer land between agencies, used “unequivocal and direct language” to do so.<sup>37</sup> The Court compared the language in the Trails Act to the Wild and Scenic Rivers Act<sup>38</sup>—enacted the same day as the Trails Act.<sup>39</sup> When drafting Wild and Scenic Rivers Act, Congress explicitly said “any component of the national wild and scenic rivers system that is administered by the Secretary of Interior through the National Park Service shall become a part of the National Park System.”<sup>40</sup> The Court reasoned that if Congress intended for the land the AT crosses to become part of the National Park System, the Trails Act would have used similarly explicit language.<sup>41</sup> Instead, Congress used terms of rights-of-ways, implying it did not intend for a land transfer for national trails.<sup>42</sup>

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30. *Id.* at 1844 (citing *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970)).

31. *Id.* at 1847.

32. *Id.* (quoting *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1812 (2019)).

33. *Id.* at 1845.

34. *Id.* at 1846.

35. *Id.* at 1848.

36. *Id.*

37. *Id.* at 1847.

38. 16 U.S.C. §§ 1271–1287 (2018).

39. *Cowpasture River Preservation Ass’n.*, 140 S. Ct. at 1847.

40. *Id.* (quoting 16 U.S.C. § 1281(c)).

41. *Id.*

42. *Id.*

The Court also warned that finding for the Respondents would entail a massive expansion of power to the Department of Interior (“DOI”) without express consent from Congress.<sup>43</sup> The AT encompasses 58,110.94 acres of non-federal land including 8,815.98 acres of private land.<sup>44</sup> Under Respondents’ argument, the DOI could expand the Park Service’s jurisdiction by delegating administrative responsibilities to the Park Service.<sup>45</sup> According to the Court, this would mean that all trails administered by the Park Service, or other lands delegated for administrative purposes, would be part of the National Park System.<sup>46</sup> The Court expressed concern for both issues in federalism and private property rights resulting from such an expansion in Park Service jurisdiction.<sup>47</sup> Under Respondents’ argument, the Court opined that all of this non-federal and private land would also fall under the jurisdiction of the Park Service.<sup>48</sup> The Court, citing its own precedent, stated that “when Congress wishes to ‘alter the fundamental details of a regulatory scheme,’ . . . we would expect it to speak with the requisite clarity to place that intent beyond dispute.”<sup>49</sup> The Court refused to presume the delegation process expanded Park Service jurisdiction without “clear congressional command.”<sup>50</sup>

The Court looked to the 1911 Weeks Act to support an absence of clear congressional command.<sup>51</sup> The Weeks Act, which established the George Washington National Forest, provides that lands acquired for the National Forest System “shall be permanently reserved, held, and administered as national forest lands.”<sup>52</sup> The Court concluded that the Trails Act must be read in conjunction with the Weeks Act, specifically pointing to the above language.<sup>53</sup> The Court further highlighted language from the Trails Act that states, “[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.”<sup>54</sup> The Court reasoned that these two provisions, the use of the term “right-of-way” in the Trails Act, and the administrative duties laid out by the Trails Act, further demonstrate a lack of congressional intent for such a vast expansion of the Park Service’s jurisdiction.<sup>55</sup>

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43. *Id.* at 1849.

44. *Id.*

45. *Id.* at 1848.

46. *Id.* at 1849.

47. *Id.*

48. *Id.*

49. *Id.* (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

50. *Id.*

51. *Id.* at 1842; 16 U.S.C. § 521 (2018).

52. *Cowpasture River Preservation Ass’n.*, 140 S. Ct. at 1842 (quoting 16 U.S.C. § 521).

53. *Id.* at 1850.

54. *Id.* (quoting 16 U.S.C. § 1246(a)(1)(A) (2018)).

55. *Id.*

#### IV. CONCLUSION

The United States Supreme Court held that the Secretary of the Interior's delegation of overall administration of the AT did not transform the land over which the trail passes into part of the National Park System.<sup>56</sup> Therefore, under the Leasing Act, the Forest Service had the authority to grant Atlantic's pipeline right-of-way.<sup>57</sup> The Court relied heavily on its analysis of congressional intent as well as public policy considerations regarding federalism and private property rights.

Despite this legal victory for Atlantic, the company stopped construction of the pipeline, citing legal uncertainties surrounding its future.<sup>58</sup> However, Atlantic may sell its vast amounts of natural gas storage and transmission pipelines to Berkshire Hathaway Energy, who would also assume Atlantic's \$5.7 billion of debt, casting further doubt on the future of the pipeline.<sup>59</sup>

Regardless of the future of the Atlantic Coast Pipeline, the Court has now set a legal precedent. The twenty-one national historic and scenic trails that the Park Service administers are not part of the National Park System. Consequentially, the agencies, states, and private landowners that granted rights-of-way for these trails ultimately retain jurisdiction and ownership of those lands. For all national historic and scenic trails that are on federal land, the agencies who have jurisdiction over the burdened land now have the full authority to grant pipeline rights-of-way under the Mineral Leasing Act.

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56. *Id.*

57. *Id.*

58. Dominion Energy, *supra* note 9.

59. Penn, *supra* note 8.